National Labor Relations Board

Weekly Summary of NLRB Cases

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C A S E S S U M M A R I Z E D
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CORRECTION: In the December 17, 2004 issue (W-2978), regarding the summary of *Lexus of Concord, Inc.*, 343 NLRB No. 94, substitute "unlawful" for "lawful" in the first sentence, second paragraph.

Armstrong Machine Co., Inc. (18-CA-16276-1, 16555-1, 18-RC-16904; 343 NLRB No. 122) Pocahontas, IA Dec. 16, 2004. In the absence of exceptions, the Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening that union representation would be futile and that it would not sign a collective-bargaining agreement if the Union (Food & Commercial Workers Local 6) won the election; and his recommendation to sustain the challenge to the ballot of Maxine Lange. It also adopted the judge's findings that the Respondent did not violate Section 8(a)(1) by, among others, creating the impression of surveillance, threatening and interrogating employee Randall Roles, and threatening to reduce or eliminate employee bonuses. [HTML] [PDF]

Members Liebman and Walsh adopted the judge's finding that Donald Meier was not a supervisor; that the challenge to his ballot be overruled; and that the Respondent's objections to the election alleging that employees Meier, Jamie Lange, and supervisor Calvin Lange threatened employees with physical harm and difficult working conditions if the employees did not vote in favor of the Union be overruled. They reversed the judge's finding that the Respondent violated Section 8(a)(3) by terminating Lange and Meier, and directed the Regional Director to open and count their ballots and thereafter, to serve on the parties a revised tally of ballots and the appropriate certification. The tally of ballots for the election of December 13, 2001 showed 9 votes for and 10 against, the Union, with 4 determinative challenged ballots.

Dissenting in part, Chairman Battista would find that Donald Meier is a statutory supervisor, that the challenge to his ballot should be sustained, and that his termination did not violate Section 8(a)(3). In making this determination, he contended that Meier assigns work, and in doing so, regularly exercises independent judgment sufficient to satisfy the requirements of Section 2(11).

Unlike his colleagues, Member Walsh would also find that the Respondent's president and partial owner, Clifford Porter committed an additional violation of Section 8(a)(1) by certain statements he made during a meeting on November 23, 2001 with supervisor Calvin Lange when he told employees Meier and Lange that they would not be able to vote in the election because they were supervisors.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Food & Commercial Workers Local 6; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Fort Dodge, Sept. 17, 18, 25, and 26, 2002. Adm. Law Judge Keltner W. Locke issued his decision March 7, 2003.

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Church Homes, Inc. d/b/a Avery Heights (34-CA-9168; 343 NLRB No. 128) Hartford, CT Dec. 16, 2004. The two main issues presented in this case were: (1) whether the Respondent's discharge of four economic strikers for alleged picket line misconduct violated the Act; and (2) whether the Respondent's failure to reinstate permanently replaced economic strikers violated the Act because the Respondent had an unlawful independent motive in hiring the permanent replacements. The administrative law judge found violations in both instances. [HTML] [PDF]

Members Schaumber and Walsh agreed with the judge that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging three of the strikers, Opal Clayton, Patricia Hurdle, and Georgia Stewart. They adopted the judge's credibility-based findings that the strikers were engaged in the protected activity of striking, and did not engage in the alleged misconduct of mimicking and ridiculing a resident's behavior. Chairman Battista disagreed that the General Counsel has shown, by a preponderance of the evidence, that the three employees did not engage in picket line misconduct. He does not believe that the judge's finding of fact is supportable, saying "there can be little doubt that the misconduct was sufficiently egregious to warrant discharge."

Chairman Battista and Member Schaumber found that the Respondent lawfully discharged the fourth striker, Pauline Taylor. Contrary to the judge, they determined that Taylor's misconduct—cursing and insulting a resident—was egregious enough to result in the loss of her Section 7 reinstatement rights. Chairman Battista and Member Schaumber also reversed the judge's finding the Respondent had an independent unlawful motive for hiring permanent replacements. They concluded instead that the Respondent used the hiring of permanent replacements to gain economic leverage over the Union in bargaining, and to continue operations during the strike.

Member Walsh dissented from the majority's reversal of the judge's finding that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the strikers upon their unconditional offer to return to work. He concluded that the General Counsel has satisfied his burden of showing that a desire to punish the strikers and break the Union's solidarity was a motivating factor in the Respondent's decision to secretly hire permanent replacements and that the Respondent has failed to show that it would have taken the same action even in the absence of any unlawful purpose.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by New England Health Care Employees District 1199; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Hartford, March 13-15, 19, 23, and 26-28, 2001. Adm. Law Judge Michael A. Marcionese issued his decision Nov. 1, 2001.

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Hahner, Foreman & Harness, Inc. (17-CA-22382, 17-RC-12206; 343 NLRB No. 133) Wichita, KS Dec. 16, 2004. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging employees Daniel Caudell and Todd Steward because they engaged in protected concerted activity when they joined together to protest the loss of their health insurance and pension benefits. Accordingly, the Board overruled the challenges to the ballots of Caudell and Steward cast in Case 17-RC-12206, severed that case from Case 17 CA-22382, and directed the Regional Director to open and count the ballots and to

issue a revised tally of ballots and the appropriate certification. The tally of ballots for the election of July 9, 2003 showed 2 votes for and 1 against, Carpenters Local 201, with 5 determinative challenged ballots. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Carpenters Local 201; complaint alleged violation of Section 8(a)(1). Hearing at Wichita on February 3, 2004. Adm. Law Judge Lawrence W. Cullen issued his decision March 17, 2004.

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Kvaerner Songer, Inc. and Laborers Local 334 (7-CA-45463, 45637, 7-CB-13451, 13458; 343 NLRB No. 130) Detroit, MI Dec. 16, 2004. The Board reversed the administrative law judge's dismissal of the complaint allegations and held that Respondent Laborers Local 334 violated Section 8(b)(1)(A) and 8(b)(2) of the Act by demanding that the Employer refrain from hiring the Charging Parties, who were union members, because they had not been referred to the Employer through the Union's hiring hall; and that the Respondent Employer violated Section 8(a)(3) and (1) by acquiescing in the Union's unlawful demands. [HTML] [PDF]

The judge found that the hiring hall arrangement was exclusive, and that the Charging Parties were not discriminated against for an unlawful reason. The Board found merit to the General Counsel's exceptions arguing that the hiring hall arrangement was nonexclusive, and therefore the Union was not privileged to insist on the hiring of only employees referred through the hall.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Michael Wilson, Clyde Escobar, III, Jesus Alcorta, Eric Garza, Sergio Garza, and Rene Gregorio Ramos, Individuals; complaint alleged violation of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and 8(b)(2). Hearing at Detroit on July 14, 2002. Adm. Law Judge Arthur J. Amchan issued his decision Sept. 25, 2003.

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The Smithfield Packing Co., Inc., Tar Heel Division (11-CA-15522, et al., 11-RC-6221; 344 NLRB No. 1) Tar Heel, NC Dec. 16, 2004. The administrative law judge found that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act. Among others, the Board adopted his findings that the Respondent violated the Act by threatening employees Lawanna Johnson and Steve Ray with discharge; disparately applying its no-solicitation/no-distribution rule; intimidating and coercing employees while union literature was being distributed; suspending employee Fred McDonald and refusing to rescind the suspension;

discharging and failing to reinstate employees McDonald, Chris Council, Larry Charles Jones, Keith Ludlum; issuing a written warning to George Simpson; and interrogating employees Paul Walker, Margo McMillan, and Ada Perry concerning their union sentiments. [HTML] [PDF]

In agreement with the judge, the Board found that the Respondent engaged in certain objectionable conduct that warranted setting aside the election held on Aug. 21-22, 1997, and remanded the proceeding to the Regional Director to conduct a new election. It held that these remedies recommended by the judge are appropriate: a broad cease-and-desist order; the mailing of a notice to all employees employed since July 3, 1993; the posting and mailing of a Spanish-language notice; a reading of the notice by a Board Agent (in English and Spanish); and providing the Union a list of names and addresses of current employee, upon request within a year of this decision.

Dissenting in part, Chairman Battista would dismiss the allegations that the Respondent violated Section 8(a)(1) by having employee Chris Council stamp an antiunion message on hogs as they went down the line. Additionally, he would dismiss the allegation concerning the discharge of Lawanna Johnson and would sever and hold in abeyance the allegations concerning the discharges of Margo McMillan and Ada Perry.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Food & Commercial Workers Local 204; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Whiteville on Oct. 19-22, 1998 and at Elizabethtown on various dates in Oct. and Nov. 1998 and Jan., Feb., March, and July 1999. Adm. Law Judge John H. West issued his decision Dec. 15, 2000.

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St. Barnabas Medical Center (22-CA-23092; 343 NLRB No. 119) Livingston, NJ Dec. 16, 2004. Chairman Battista and Member Schaumber reversed the administrative law judge's decision and dismissed the complaint without reaching the merits of the unfair labor practice allegations. Member Walsh dissented. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize the Union (Communications Workers Local 1091) as the bargaining representative of certain classifications of registered nurses (RNs) and by failing to apply the terms of the collective-bargaining agreement to them "within the meaning of Section 8(d)." [HTML] [PDF]

The majority agreed with the Respondent that the complaint is time-barred under Section 10(b) of the Act. They found that the Respondent raised a valid affirmative defense by showing that the Union had clear and unequivocal notice, outside the 6-month limitations period, that the Respondent repudiated the contract by refusing to apply it to employees in the disputed classifications. The majority wrote: "Because the unfair labor practice charge was filed on December 21, 1998, and because the Union had clear and unequivocal notice of a completed violation of the Act as early as July 1997 and no later than June 2, 1998, we conclude that the

complaint is time-barred under Section 10(b) of the Act. Therefore, we shall dismiss the complaint."

Dissenting, Member Walsh concluded that the judge correctly rejected the Respondent's Section 10(b) defense because the Union did not have clear and unequivocal notice of a violation outside the 10(b) period. He wrote: [T]he judge correctly found that even assuming the Union had such notice, the Respondent's conduct in failing to recognize the Union as the representative of the disputed RNs and in failing to apply the existing contract to them resulted in a series of separate and distinct violations for which the Union is entitled to a remedy that encompasses the 6 months prior to the date the Union filed its charge."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Communications Workers Local 1091; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark between Feb. 25 and March 28, 2002. Adm. Law Judge Jesse Kleiman issued his decision Sept. 10, 2002.

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TXU Electric Co. (16-CA-20247; 343 NLRB No. 132) Glen Rose, TX Dec. 16, 2004. Chairman Battista and Member Schaumber affirmed the administrative law judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(5) of the Act by changing its past practice of annual salary plan adjustments for unit employees while it negotiated with the Electrical Workers IBEW Local 2337 for an initial contract. Member Walsh dissented. [HTML] [PDF]

The judge found that the Respondent did not violate the Act because it gave sufficient notice to the Union of the proposed change and the Union declined to request bargaining over it. The majority agreed with the judge that the Respondent did not act unlawfully in the circumstances of this case, which involve an exception to the general requirement of an overall bargaining impasse prior to implemental of a proposal. According to the judge, the "Respondent did what it was legally required to do" by providing the Union with notice, on May 7, of its intent "to maintain the status quo of the [1999] plan" and by providing the Union with an opportunity to "negotiate knowing of the likelihood that Respondent would adopt a new technicians salary plan in December 1999." Chairman Battista and Member Schaumber found, in agreement with the judge, that the Respondent did not violate the Act by declining to apply the 2000 wage increase to unit employees.

In dissent, Member Walsh said that the Respondent was not privileged to unilaterally deny unit employees an annual wage increase in the absence of an overall impasse in negotiations for a collective-bargaining agreement. He wrote: "The majority's holding to the contrary disregards the Board's well-established principle that, absent extraordinary circumstances not present in this case, an employer must refrain from making unilateral changes to terms and conditions of employment prior to overall impasse in negotiations for a collective-bargaining agreement as a whole. In other words, an employer cannot bargain piecemeal over

discrete terms and conditions of employment; instead, it must maintain the status quo of all mandatory subjects of bargaining during the course of contract negotiations." Therefore, he contended that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing a term and condition of employment during negotiations for a collective-bargaining agreement.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Electrical Workers IBEW Local 2337; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Ft. Worth on March 7, 2000. Adm. Law Judge Pargen Robertson issued his decision June 9, 2000.

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Wal-Mart Stores, Inc. (19-CA-27720; 343 NLRB No. 127) Wasilla, AK Dec. 16, 2004. The Board reversed the administrative law judge and dismissed the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by requiring Ken Stanhope to continue participating in an investigatory interview after denying his request for the presence of a witness at the interview and violated Section 8(a)(3) and (1) by discharging Stanhope for his union activity. Members Liebman and Walsh severed and remanded to the judge the complaint allegation that the Respondent violated Section 8(a)(1) by discharging Stanhope for his protected concerted activity. Chairman Battista disagreed with his colleagues that a remand is necessary. [HTML] [PDF]

The judge found that under *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002), the Respondent violated Section 8(a)(1) by requiring Stanhope to continue an investigatory interview on March 16, 2001, after Stanhope's request for a witness at the interview had been denied. The judge further found that the Respondent violated Section 8(a)(1) by terminating Stanhope on March 17 after he refused to attend a subsequent interview without the presence of a witness. After issuance of the judge's decision, the Board issued its decision in *IBM Corp.*, 341 NLRB No. 148 (2004), overruling *Epilepsy Foundation* and holding that an employee not represented by a union does not have a statutory right to the presence of a coworker at an investigatory which the employee reasonably believes could lead to discipline.

Members Liebman and Walsh found it unclear from the judge's decision whether he found that Stanhope was discharged for requesting a witness on March 16 or for refusing to participate in an investigatory interview without a witness on March 17. They wrote: "Because the judge's findings are based on *Epilepsy Foundation*, which was overruled in *IBM*, and because under *IBM* the lawfulness of Stanhope's discharge depends on whether he was discharged for his March 16 request or his March 17 refusal, a remand is required."

Chairman Battista found that dismissal of the Section 8(a)(1) allegation concerning the Respondent's discharge of employee Stanhope is warranted under *IBM*. He noted that there were at least three reasons for discharging Stanhope, all of which were unprotected activity. First, Stanhope refused to attend the meeting without a witness; second, Stanhope refused to supply a statement; and third, absent any rebuttal from Stanhope, the Respondent found that

Stanhope used profanity and caused distress to a complaining employee. Chairman Battista stated: "[R]ather than further prolong this matter, I would assess the evidence and dismiss the complaint now."

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Food & Commercial Workers; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Anchorage on June 27 and 28, 2002. Adm. Law Judge Burton Litvack issued his decision Nov. 8, 2002.

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Washington Fruit and Produce Co. (19-CA-25404, et al., 19-RC-13536; 343 NLRB No. 125) Yakima, WA Dec. 16, 2004. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(1) of the Act by (1) telling employees that they could not engage in union activity on company property; (2) coercively interrogating employees about their union sympathies and threatening them with the loss of their jobs for seeking union representation; (3) making comments that employees who choose to wear prounion apparel were "cutting their own throats" or "putting their heads in a noose"; (4) ordering employees to wear "No Union" T-shirts; and (5) intimidating employees by falsely accusing them of holding union meetings during work. [HTML] [PDF]

It also agreed with the judge that the Respondent violated Section 8(a)(3) and (1) by issuing an enhanced warning to employee Ana Guzman because she engaged in union activity, and issuing a warning to Indalecio Mata for parking his car near the Respondent's front entrance because it contained a union placard. The Board affirmed judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by refusing to reinstate Maria Abundiz upon her return from Mexico; and did not violate Section 8(a)(1) by asking two employees who were dressing in heavy jackets before entering the cold room if they were putting on their "bulletproof vests" or by videotaping employees during a union rally, and by videotaping employees during a union rally.

The Board reversed the judge and held that the Respondent did not violate Section 8(a)(3) and (1) by warning employees and demoting employee Smith for violating the Respondent's no-solicitation rule and by discharging employee Ana Guzman for work-related misconduct.

Member Schaumber would reverse the judge's finding that Shift Manager Bautista unlawfully threatened employees Flores, Martin, Alvarez, and Clemente Gomez when she told them that she did not want them having any union meetings in the cold room. He would also dismiss the complaint allegation that the Respondent enforced its parking regulations more stringently against Mata.

Chairman Battista and Member Schaumber noted that while they agreed with the judge that Shift Manager Bautista violated Section 8(a)(1) by unlawfully directing Aleida Barton and Rosa Garcia to wear a "No Union" T-shirt at work against their wishes, Bautista's conduct does not warrant setting aside the Jan. 8, 1998 election, which the Teamsters lost 161-121. They certified the results of the election, finding "it virtually impossible to conclude that the election outcome could have been affected " given the isolated nature of the misconduct occurring more than a week before the election and the fact that the election was not close.

Dissenting in part, Member Walsh wrote: "The majority erroneously dismissed the complaint allegations that the Respondent violated the Act by disciplining four employees for talking about the Union, by discharging the leading union adherent, Ana Guzman, and by videotaping employees participating in a union rally. In addition, the majority errs in overruling the Union's *Excelsior* [*Excelsior Underwear*, 156 NLRB 1236 (1966)] objection and failing to direct a second election."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Teamsters; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Yakima, over 53 days during 1998 and 1999. Adm. Law Judge James M. Kennedy issued his decision Dec. 29, 2000.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Expotel Hospitality Services, LLC (an Individual) Phoenix, AZ December 21, 2004. 28-CA-19185; JD(SF)-80-04, Judge William L. Schmidt.

THI of Columbus, Inc. d/b/a Autumn Court (SEIU District 1199) Ottawa, OH December 30, 2004. 8-CA-34334; JD-120-04, Judge George Alemán.

Contek Int., Inc. (Laborers Local 592) Piscataway, NJ December 30, 2004. 22-CA-26321; JD(ATL)-65-04, Judge William N. Cates.

DaimlerChrysler Corp. (Auto Workers [UAW] Local 412) Detroit, MI December 30, 2004. 7-CA-46123, et al., JD(ATL)-67-04, Judge George Carson II.

DCT Incorporated (Government Security Officers Local 243 and Individuals) McAlester, OK December 30, 2004. 17-CA-22392, et al.; JD(ATL)-59-04, Judge John H. West.

The Geweke Co. d/b/a Larry Geweke Ford (Machinists District Lodge 190, Local Lodge 2182) Yuba City, CA December 29, 2004. 20-CA-31889; JD(SF)-81-04, Judge Gerald A. Wacknov.

City Stationery, Inc. (Union de Tronquistas De Puerto Rico IBT Local 901) Caguas, PR December 20, 2004. 24-CA-9070; JD(ATL)-62-04, Judge William N. Cates.

Service Employees Local 1 (an Individual) Chicago, IL December 28, 2004. 13-CA-41636; JD-122-04, Judge Arthur J. Amchan.

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(***In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers***

DECISION AND DIRECTION OF SECOND ELECTION

San Luis Trucking, Inc., San Luis, AZ, 28-RC-6291, December 29, 2004
(Chairman Battista and Members Liebman and Schaumber)

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Miscellaneous Board Orders

ORDER[vacating decision of December 20, 2004 and substituting Decision and Certificate of Results of Election]

Aacres/Allvest, L.L.C., Vancouver, WA, 36-UD-357, December 28, 2004
(Chairman Battista and Members Liebman and Schaumber)

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